A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

First Appeal No. 178/2003

Smt. Sharda Sharma

Vs.

Santosh Sharma

Post for Judgment 16.04.2007

Sd/-
Dilip Raosaheb Deshmukh
Judge

A.F.R (56)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Before: Hon'ble Shri Justice Dilip Raosaheb Deshmukh

First Appeal No.178/2003

APPELLANT NON-APPLICANT : Smt. Sharda Sharma, wife of Shri Santosh Sharma, aged about 31 years, resident of Badaee Para, Gobara, Nawaparam, Rajim, Tehsil and District Raipur (C.G.)

Versus

RESPONDENT APPLICANT : Santosh Sharma, S/o Kalaktor Sharma, aged 34 years, resident of Badaee Para, Shiv Nagar Vishwakarma Chowk, Raipur, Tehsil and District Raipur

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Present:
Smt. Renu Kochar, Counsel for the appellant/non-applicant.
Smt. Fouzia Mirza, Counsel for respondent/applicant.

J U D G M E N T
(Delivered on this 16th day of April, 2007)

Being aggrieved by the *ex parte* judgment and decree for dissolution of marriage, dated 17.07.2002 in Civil Suit No. 95-A of 2001 passed by Smt. Nirmala Singh, 5th Additional District Judge, Raipur, the appellant/non-applicant wife has preferred this appeal.

2. This is an example of how in a matrimonial matter serious consequences follow in the life of the appellant/wife due to a most deplorable manner in which the trial was conducted by the trial Judge

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before granting an *ex parte* decree for dissolution of marriage at the mere *ipsi dixit* of the respondent/applicant.

3. Appellant preferred the appeal on 16.08.2003 contending that the learned lower Court committed a grave error of law in passing the impugned *ex parte* judgment and decree in favour of the respondent on the following grounds:

(a) the judgment and decree is contrary to law and material available on record;

(b) no notice of the suit had been served on the appellant much less for the date fixed for 05-02-2002 on which date the Court proceeded *ex parte* against her;

(c) no evidence documentary or oral was adduced to prove that the appellant had failed to discharge her conjugal rights;

(d) the report lodged by the father of the respondent on 12.12.1993 clearly established the fallacy of allegations levelled by the respondent/applicant.

4. Along with the appeal the appellant also filed an application under Section 5 of the Limitation Act for condonation of delay in filing the appeal on the following grounds:

i. That the appellant only in the last week of June 2003 came to know that the respondent has performed second marriage after obtaining the ex parte judgment and decree of divorce.

ii. That after knowing this fact the appellant lodged a report against the respondent and his father at Police Station Gobra Nawapara on 1.7.2003, a copy of FIR is annexed hereto as ANNEXURE A-1.

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iii. That the delay occurred in filing the appeal is bonafide and deserves to be condoned.

The delay in filing the appeal was condoned vide order dated 19.01.2007.

5. Santosh Sharma, the respondent herein, filed a petition under Section-13 of Hindu Marriage Act, 1955 (hereinafter referred to as the Act 1955) for dissolution of marriage on the ground that a year after their marriage on 25.02.1988, Lakhan Sharma, brother of the appellant herein, took the appellant and the respondent to the maternal home of the appellant in Badhaipara, Nawapara, Rajim where the respondent lived for a period of 6 -7 months. Since the parents of the appellant herein ill-treated the respondent, he returned alone to his house at Raipur. A month thereafter, the respondent herein went to Nawapara, Rajim to bring the appellant herein home but he was ill-treated by the parents and brother of the appellant herein and the appellant also refused to return to her matrimonial home. Thereafter, on many occasions, the respondent went to Nawapara, Rajim with his father and the Panchas to bring the appellant home but the appellant refused. On 12.12.1993, Kalaktor Sharma, father of the respondent also went to Nawapara, Rajim to bring the appellant home but father of the appellant misbehaved and refused to send the appellant with him to Raipur. A report was lodged in Police Station, Rajim on 12.12.1993 by Kalator Sharma, father of the respondent. More than 5 years thereafter on 21.05.1999, the respondent, his father and uncle of respondent-Gulab Sharma went to Nawapara, Rajim to bring the appellant home but the appellant again refused. The son born out of the marital wedlock was aged 10 years and therefore,

the respondent was willing to keep the appellant with him and with that intention about two months prior to the filing of the application on 10.05.2001, the respondent had again gone to Nawapara, Rajim but the appellant, her parents and brother ill-treated him and the appellant also refused to return to her matrimonial home. Thereafter, on 14-03-2001, a registered notice with acknowledgment due was sent by the respondent herein. Despite receipt of notice, the appellant neither replied nor returned to her matrimonial home. It was contended that the appellant herein was residing away from the respondent for more than 10 years without establishing conjugal relationship, and therefore, it was prayed that the marriage between the parties be dissolved.

6. Upon filing of the petition on 10.05.2001, the trial Judge ordered that on payment of P.F. within three days summons be issued to the appellant/non-applicant in the ordinary course as also through registered post for filing written statement and also for reconciliation. On the next date i.e. 24-07-2001, it was mentioned in the order sheet that the summons was not issued because the process fee was not paid. The respondent herein was directed to pay process fee within 3 days for issuance of summons to the appellant/non-applicant in the ordinary course as also by registered post for filing of written statement and reconciliation on the next date i.e. 14.09.2001. On 14.09.2001 and thereafter on the next date i.e. 22.11.2001 the trial Judge was on leave and the matter was adjourned. It was noted by the Reader in the order sheet dated 14.09.2001 that the appellant herein/non-applicant was absent and the summons issued in the ordinary course as also by registered post were returned with the endorsement of refusal. On 05.02.2002 although no fresh summons

was issued to the appellant/non-applicant for appearance on 05.02.2002, it was mentioned in the order sheet that the non-applicant was absent and had refused to accept the summons. Neither the form in which P.F. is paid nor any summons issued in the ordinary course and duly returned after refusal by the appellant/non-applicant is seen on the record of the lower Court. There is no endorsement about issuance of summons in the margin of the order sheet also. The Trial Judge, without noticing the fact that the respondent/applicant had not paid P.F. for issuance of notice in the ordinary course and no summons in the ordinary course had either been issued or received unserved, ordered that the appellant/non-applicant be proceeded *ex parte* and thereafter fixed the matter for recording *ex parte* evidence.

7. The trial judge completely lost sight of the fact that the registered notice issued to the appellant/non-applicant wife through Court had an endorsement which was highly suspicious because the endorsement made by the Post-man was completely scratched so as to be rendered illegible and thereafter some endorsement was made on top of it which was earlier dated 17-07-2001 but was later on forged to look like 17-08-2001. The registered notice was issued vide order dated 24-07-2001, therefore, the endorsement of the Post-man could not have been dated 17-07-2001. Another factor which was overlooked by the trial Judge is that original acknowledgment of receipt of notice dated 14-03-2001 was not filed by the applicant/respondent. It is also pertinent to note that in the report lodged on 12-12-1993 by the father of the applicant/respondent, it was not mentioned that the appellant herein had refused to live with the applicant/respondent. The allegations were only against the father

of the appellant herein. The trial Judge ought to have taken into consideration all these facts instead of mechanically recording evidence on a petition under Section-13 of the Act.

8. The trial Judge also overlooked the fact that the summons was ordered to be issued for reconciliation and that on the date fixed for reconciliation efforts the trial Judge was on leave. It was also overlooked that the trial Judge was again on leave on the next date. It was also overlooked that on 05-02-2002 there was no material on record to show that any summons had been issued against the appellant/non-applicant for appearance before the Court or had been received unserved for 5.2.2002. The Trial Judge completely oblivious of the serious consequences of her utterly negligent approach mechanically recorded *ex parte* evidence of the respondent/applicant as a mute spectator on 29-04-2002 and did not ask a single Court question to verify the truth. Time was sought by the respondent/applicant for adducing more evidence. On the next date i.e. 02-05-2002 time was again sought by the respondent/applicant and the matter was adjourned for remaining evidence on 12-07-2002. It did not occur to the trial Judge that despite several allegations in the petition against the parents of the appellant/non-applicant and the availability of the witnesses, the respondent/applicant had failed to adduce any evidence. On 12-07-2002, counsel for the applicant did not lead any evidence and declared evidence of the applicant closed. Arguments were heard on the same day and the case was posted for judgment. On 17-07-2002 an *ex parte* judgment and decree granting dissolution of marriage between two spouses was passed at the mere *ipsi dixit* of the respondent/applicant.

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9. The trial Judge also did not notice that along with petition for obtaining divorce, the respondent/applicant had filed a document dated 12-12-1993 being a report lodged by the father of the respondent at P.S. Rajim. It clearly mentions that on the date of the report i.e. 12-12-1993 the applicant had a son aged 1 ½ years from the appellant herein. The learned trial Judge completely ignored this document which revealed that conjugal relationship between the two spouses had continued definitely till June 1992 because the son of the applicant and the respondent was aged 1 ½ years on 12-12-1993 and was living with her mother. It positively shows that the contention of the applicant/respondent in the petition under Section-13 of the Act that somewhere from May-June 1990 the appellant/non-applicant had refused to return to her matrimonial home and did not establish conjugal relationship with the respondent/applicant was utterly false.

10. The trial Judge also completely lost sight of its obligation under Section 23 sub-sections (2) and (3) of the Act. The observations of the Apex Court in *Balwinder Kaur v. Hardeep Singh,* **AIR 1998 Supreme Court 764** need to be reproduced herein for guidance of the judges presiding over the family courts:

> "A petition for divorce is not like any other commercial suit. A divorce not only affects the parties, their children, if any, and their families but the society also feels its reverberations. Stress should always be on preserving the institution of marriage. That is the requirement of law. One may refer to the Objects and Reasons which led to setting up of Family Courts under the Family Courts Act, 1984. For the purpose of settlement of family disputes emphasis is "laid on conciliation and achieving socially desirable results" and eliminating adherence to rigid rules of procedure and evidence. These further note:

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"The Law Commission in its 59th Report (1974) had also stressed that in dealing with disputes concerning the family the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to mattes concerning the family. However, no much use has been made by the Courts in adopting this conciliatory procedure and the Courts continue to deal with family disputes in the same manner as other civil matters and the same advisory (adversary) approach prevails."

It is now obligatory on the part of the Family Court to endeavour in the first instance to effect a reconciliation or settlement between the parties to a Family dispute.

Section 23 of the Hindu Marriage Act mandates the Court before granting decree for divorce, whether defendant or not to satisfy itself (1) if the grounds for claiming relief exist and the petitioner is not taking advantage of his or her own wrong or disability for the purpose of such relief, and (2) the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of; or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty. A duty is also cast on the Court in the first instant, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. Under sub-sec. (3) of S.23 of the Act, the Court can even refer the matter to any person named by the parties for the purposes of reconciliation and to adjourn the matter for that purpose. These objective and principles govern all courts trying matrimonial matters. The judgment of the District

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> Judge is silent if the learned Judge took into consideration all what is mentioned in S.23 of the Act. A question also arises can a party defeat the provisions of sub-section (2) and sub-section (3) of S.23 of the Act by remaining ex parte and the Court is helpless in requiring the presence of that party even if the circumstances of the case so required. We are of the opinion that Court can in such a situation require the personal presence of the parties. Though the proceedings were ex parte in the case like this the Court cannot be a silent spectator and it should itself endeavour to find out the truth by putting questions to the witnesses and eliciting answers from them."

11. It is also well settled that if on a date of hearing the trial Judge is on leave, fresh notice for the next date of hearing ought to be issued against the defendant. It is regretted that the trial Judge ignored the basic elements of procedural law and without making any endeavour for securing attendance of the non-applicant before the Court and without perusing the record proceeded *ex parte* against the appellant/non-applicant on 05.02.2002.

12. While recording evidence in a matrimonial matter, the Court is not required to sit like a silent spectator and to pronounce judgment at the *ipsi dixit* of the husband (i.e., the sole witness). In *Zahira Habibulla H. Sheikh and another v. State of Gujarat and others* **(2004) 4 Supreme Court Cases 158,** it was observed by the Apex Court that the Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witness. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record and the necessary material to do complete justice in the matter is elicited from the witness. In the

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present case, the trial Judge acted in a most deplorable manner. Had the trial Judge applied her mind to the facts of the case and put the following questions to the husband, the fallacy of the ground of desertion would have surfaced:

a) Why did the husband not initiate proceedings for restitution of conjugal rights for so many years?

b) How was that it was alleged in the petition that conjugal relationship between the two spouses was not established beyond December 1989 and in the report lodged by the father of the applicant/respondent on 12.12.1993 the age of the son was mentioned to be 1 ½ years.

c) Why did the husband not examine his father Kalaktor Sharma to prove the alleged misbehaviour by the appellant/non-applicant's parents?

d) Was it that the husband himself left the wife at his matrimonial home after living with her there for a number of years?

e) How was that the endorsement on the registered notice for 14-09-2001 sent by the Court was completely scratched?

f) How was that there was interpolation in the date put by the post-man?

g) Why did the applicant/husband not examine Gulab Sharma, the independent witness in whose presence the wife had refused to go to her matrimonial home?

h) What was the reason that despite the fact that the wife was alleged to have refused to live with the husband from December, 1989, the notice was sent for the first time on 14.03.2001?

i) Whether the husband had explained any reasons for the wife's refusal to live with him?

j) Why did the husband not pay process fee for

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issuance of summons by ordinary course despite there being an order of the Court on 10.05.2001 and again on 24.07.2001?

k) Was the husband on visiting terms with his wife at her maternal home for number of years which was the reason that a son was born in the year June 1992?

l) Why did the husband not adduce any evidence despite grant of several opportunities by the Court?

13. After eliciting answers from the husband/applicant on the above questions, the Court would have been able to arrive at a proper conclusion and to do complete justice between the parties. The Court was not powerless to issue summons directly to the wife for securing her appearance before the Court for reconciliation. It is regretted that the trial Judge did not apply her mind to the mandatory provision of section 23 of the Hindu Marriage Act and made no efforts to secure the presence of the wife in order to make an effort for reconciliation between the parties.

14. The trial Judge also failed to notice that the applicant/respondent had in his statement on oath admitted that out of their conjugal relationship, a son was born who was aged 10 - 11 years. Therefore, his statement in paragraph 9 that during the last 10 years the wife had deserted him had an element of doubt. There is nothing in his statement to show that the appellant/non-applicant refused to establish conjugal relationship with him when he used to visit the house of the appellant where he had willingly gone with his wife to live. So far as the statement in paragraph 6 that the non-applicant misbehaved with his father Kalaktor Sharma on 12.12.1993 is concerned, it is rendered false because in the copy of the report

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lodged by Kalaktor Sharma on 12.12.1993 at Police Station Rajim outpost, no such allegation has been made against the appellant/non-applicant. In paragraph 3 of his deposition, although it was stated that the behaviour of his father-in-law and mother-in-law was not good during his stay for 6 - 7 months in Nawapara, Rajim, yet no allegation had been levelled against the appellant/non-applicant.

15. A look at the First Information Report lodged by the appellant/non-applicant wife at P.S. Gobra Nawapara on 9.6.2003 before filing the appeal shows the fallacy of the petition. It reads as under:

> मैं बढ़ई पारा गोबरा नवापारा की निवासी हूँ मेरा एक लड़का है। मेरी शादी सन् 1988 में संतोष शर्मा बढ़ई पारा शिवनगर विश्वकर्मा चौक रायपुर वाले के साथ हुई थी शादी के एक साल बाद से ही मेरा पति संतोष शर्मा और ससुर कलेक्टर शर्मा मुझसे पचास हजार रूपया की मांग कर मायके से पैसा मंगवाने लगे तब मैंने उनसे कहा की इतना पैसा मेरे मां बाप कहां से देंगे <u>सन् 1992 में मुझे एक लड़का पैदा हुआ है जिसका नाम नवीन शर्मा हैं</u> (Emphasis supplied by me) उसके बाद मेरा पति और ससुर दोनो मेरे ऊपर दबाव डालकर बोले की मायके जाओ और पचास हजार रूपया लेकर आओ आटो पाटर्स की दुकान डालना है बोलकर मेरा पति और ससुर मुझे साथ लाकर गोबरा नवापारा में मेरे मायके में छोड़ गये थे उसके बाद मेरा पति को बुलाकर मेरा भाई लखन शर्मा समझाया और वहीद मुसलमान के पास बस स्टैण्ड में यही मोटर मैकेनिक का काम सिखवाया <u>तब मेरा पति यहां मेरे साथ आठ साल रहा</u> (Emphasis supplied by me) मगर उसके बाद मेरा ससुर आकर मेरे पति को अपने साथ लेकर चला गया सन् 2001 मार्च महीना में मेरा पति संतोष शर्मा आकर

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और बोला पचास हजार रूपये का इन्तजाम हो गया की नही तब मैं बोली इतना पैसा का इन्तजाम कहां से होगा तो संतोष शर्मा मेरे भाई लखन शर्मा और मॉ चन्द्रा शर्मा से खूब लड़ाई झगड़ा किया तथा बोला अपनी बहन को रखे रहो वह नही ले जायेगा उसके बाद 4.5.2003 को संतोष धमतरी के दरोगा शर्मा की लड़की से दूसरी शादी किया है यह जानकारी मुझे मिली तो पताकर के थाना में रिपोर्ट लिखवाने आई हूँ मैं अपनी रिपोर्ट पढ़कर देखा तथा मेरे बताए अनुसार ही लिखी गई है। जॉच चाहती हूँ।

It thus appears that after their marriage in 1988 the respondent/applicant husband had lived with the appellant wife at her maternal home from 1992 for eight years i.e. till the year 2000 and had left her due to non-payment of Rs.50,000/- by the father for starting an auto parts business. Alas, if the trial Court Judge had been vigilant and had secured the presence of the appellant/non-applicant before her, truth would have surfaced and the *ex parte* decree for dissolution of marriage would not have been passed. Due to the second marriage by the respondent/applicant, the married life of the appellant wife has thus been completely ruined for no fault of hers.

16. In view of the above facts and circumstances, I am of the considered view that the trial Court was wholly unjustified in recording a finding that the appellant/non-applicant had deserted the applicant/respondent. In this view of the matter, the appeal is allowed. The impugned *ex parte* judgment and decree for dissolution of marriage passed by the 5th Additional District Judge, Raipur in Civil Suit No. 95-A of 2001 is set aside. Parties are directed to appear before the trial Judge on 9th of May, 2007.

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17. A copy of the judgment be sent to all Judges of the Family Courts in the State for their guidance.

Sd/-
Dilip Raosaheb Deshmukh
Judge

16 -04-2007